

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

UNITED STATES OF AMERICA and
STATE OF NORTH DAKOTA,

Plaintiffs,

v.

MINNKOTA POWER COOPERATIVE, Inc. and
SQUARE BUTTE ELECTRIC COOPERATIVE,

Defendants.

Civil Action No:

COMPLAINT

The United States of America ("United States"), by authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), and the State of North Dakota, acting at the request of the North Dakota Department of Health ("NDDH"), allege as follows:

NATURE OF THE ACTION

1. This is a civil action brought against Minnkota Power Cooperative, Inc. ("Minnkota") and Square Butte Electric Cooperative ("Square Butte") pursuant to Sections 113(b) and 167 of the Clean Air Act ("the Act"), 42 U.S.C. §§ 7413(b) and 7477, for injunctive relief and the assessment of civil penalties for violations of the Prevention of Significant

Deterioration (“PSD”) provisions of the Act, 42 U.S.C. §§ 7470-92, Title V of the Act, 42 U.S.C. § 7661 *et seq.*, and the federally approved and enforceable North Dakota State Implementation Plan (“SIP”).

2. As set forth more fully herein, between 1980 and the present, Minnkota and Square Butte (collectively, the “Settling Defendants”) modified and thereafter operated certain coal-fired electricity generating units without first obtaining a PSD permit authorizing the construction and without installing the best available technology to control emissions of sulfur dioxide (SO₂), nitrogen oxides (NO_x), and particulate matter (PM), as required by the Act, applicable federal regulations, and the SIP.
3. As a result of the Settling Defendants’ operation of the unlawfully modified electricity generating units (“Units”) without appropriate pollution controls, massive amounts of NO_x, SO₂, and PM have been, and still are being, released into the atmosphere.

JURISDICTION AND VENUE

4. This Court has jurisdiction of the subject matter of this action pursuant to Sections 113(b) and 167 of the Act, 42 U.S.C. §§ 7413(b) and 7477, and pursuant to 28 U.S.C. §§ 1331, 1345, and 1355.
5. Venue is proper in this District pursuant to Sections 113(b) of the Act, 42 U.S.C. §§ 7413(b), and 28 U.S.C. §§ 1391(b), (c) and 1395(a), because violations occurred and are occurring in this District, and the facility at issue is owned and/or operated by the Settling Defendants in this District.

NOTICES

6. The United States has provided notice of the commencement of this action to the State of North Dakota as required by Section 113(b) of the Act, 42 U.S.C. § 7413(b).
7. The 30-day period established in 42 U.S.C. § 7413, between issuance of the Notice of Violation and commencement of a civil action, has elapsed.

THE DEFENDANTS

8. Minnkota is a regional power generator and cooperative electric utility serving eleven member-owner distribution cooperatives and utilities in Minnesota and eastern North Dakota. Minnkota has a service area of approximately 35,000 square miles. Minnkota is a "person" within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e). At all times relevant to this action, including the present, Minnkota has operated Units 1 and 2 of the Milton R. Young Station in Center, North Dakota, and has owned Unit 1 at the facility. Both Unit 1 and Unit 2 at the Milton R. Young Station are coal-fired Units.
9. At all times relevant to this action, including the present, Square Butte has owned Unit 2 of the Milton R. Young Station.

STATUTORY AND REGULATORY BACKGROUND

10. The Clean Air Act is designed to protect and enhance the quality of the nation's air so as to promote the public health and welfare and the productive capacity of its population.
See Section 101(b)(1) of the Act, 42 U.S.C. § 7401(b)(1).

A. The National Ambient Air Quality Standards

11. Section 108(a) of the Act, 42 U.S.C. § 7408(a), requires the Administrator of EPA to identify and promulgate air quality criteria for each air pollutant which may endanger public health or welfare when emitted, and which results from numerous or diverse mobile or stationary sources. For each such pollutant, Section 109 of the Act, 42 U.S.C. § 7409, requires EPA to promulgate national ambient air quality standards (“NAAQS”) requisite to protect the public health and welfare. Pursuant to Sections 108 and 109, EPA has identified and promulgated NAAQS for NO₂, SO₂, PM (now measured in the ambient air as PM-10) and ozone. See 40 C.F.R. §§ 50.4 - 50.11.
12. Under Section 107(d) of the Act, 42 U.S.C. § 7407(d), each state is required to designate those areas within its boundaries where the air quality is better or worse than the NAAQS for each criteria pollutant, or where the air quality cannot be classified due to insufficient data. An area that meets the NAAQS for a particular pollutant is an “attainment” area. An area that does not meet the NAAQS is a “nonattainment” area. An area that cannot be classified due to insufficient data is “unclassifiable.”
13. At all times relevant to this action, the Milton R. Young Station was located in areas that had been classified as attainment for SO₂, NO_x, PM/PM-10, and ozone.

B. The Prevention of Significant Deterioration Requirements

14. Part C of Title I of the Act, 42 U.S.C. §§ 7470-7492, sets forth requirements for the prevention of significant deterioration of air quality in those areas designated as either attainment or unclassifiable for purposes of meeting the NAAQS standards. These

requirements are designed to protect public health and welfare, to assure that economic growth will occur in a manner consistent with the preservation of existing clean air resources, and to assure that any decision to permit increased air pollution is made only after careful evaluation of all the consequences of such a decision and after public participation in the decision making process. These provisions are referred to herein as the "PSD program."

15. Sections 110(a) and 161 of the Act, 42 U.S.C. §§ 7410(a) and 7471, require each state to adopt a SIP that contains emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality in areas designated as either in attainment with NAAQS or unclassifiable.
16. A state may comply with Sections 110(a) and 161 of the Act by having its own PSD regulations approved by EPA as part of its SIP, which must be at least as stringent as those set forth at 40 C.F.R. § 51.166. If a state does not have a PSD program that has been approved by EPA and incorporated into the SIP, the federal PSD regulations set forth at 40 C.F.R. § 52.21 may be incorporated by reference into the SIP. 40 C.F.R. § 52.21(a).
17. The PSD provisions of the State of North Dakota SIP is set forth in Chapter 33-15-15 of the North Dakota Administrative Code. EPA first approved these SIP provisions on May 26, 1977 at 42 Fed. Reg. 26977. See 40 C.F.R. §§ 52.1820(c)(6) and 52.1829. The SIP has since been amended on a number of occasions, and EPA has also approved each subsequent amendment. The North Dakota regulations provide that no construction or

operation of a major stationary source or modification of a major stationary source may occur in an area designated as attainment without first obtaining a PSD permit. The North Dakota PSD regulations are federally enforceable.

18. Under North Dakota's PSD regulations, a "major stationary source" is defined to include fossil fuel-fired steam electric plants of more than 250 million British thermal units (Btu) per hour heat input which emit or has the potential to emit 100 tons per year or more of any regulated air pollutant. N.D. Admin Code § 33-15-15-01(1)(y); 40 C.F.R. § 52.21(b)(1).
19. The North Dakota PSD regulations define the term "construction" as "any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions." N.D. Admin Code § 33-15-15-01(1)(l); 40 C.F.R. § 52.21(b)(8). See also 42 U.S.C. § 7479(2)(C) ("construction" includes the "modification" of a source or facility).
20. The North Dakota PSD regulation defines the term "major modification" as "any physical change in, or change in the method of operation of a major stationary source that would result in a significant net emission increase of any air contaminant subject to regulation under North Dakota Century Code chapter 23-25." N.D. Admin Code § 33-15-15-01(1)(x); SIP approved on August 8, 2005 at 70 Fed. Reg. 45542; 40 C.F.R. § 52.21(b)(2).
21. Under the North Dakota PSD regulation, "Net emissions increase" means "the amount by which the sum of the following exceeds zero: (a) Any increase in actual emissions

from a particular physical change or change in method of operation at a stationary source; and (b) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.” N.D. Admin Code § 33-15-15-01(1)(aa); 40 C.F.R. § 52.21(b)(3); *see also* N.D. Admin Code § 33-15-15-01(1)(a) (Definition of actual emissions). “Significant” means a rate of emissions that would equal or exceed any of the following rates for the following pollutants: NO_x, 40 tons per year; SO₂, 40 tons per year; and PM, 25 tons per year. N.D. Admin Code § 33-15-15-01(1)(hh); 40 C.F.R. § 52.21(b)(23).

22. As set forth in 42 U.S.C. § 7475(a)(4) and N.D. Admin chapter 33-15-15, a source with a major modification in an attainment or unclassifiable area must install and operate the best available control technology (“BACT”), as defined in North Dakota regulation N.D. Admin Code § 33-15-15-01(1)(g); 40 C.F.R. § 52.21(b)(12) and 42 U.S.C. § 7479(3), where the modification would result in a significant net emissions increase of a pollutant subject to regulation under the Act. 42 U.S.C. § 7475(a)(4).
23. Any application for a PSD permit must be accompanied by an analysis of ambient air quality in the area. N.D. Admin Code § 33-15-15-01(4)(g); 40 C.F.R. § 52.21(m).
24. The North Dakota PSD regulations also require any person who wishes to modify a major source in an attainment area to demonstrate, before construction commences, that the construction will not cause or contribute to air pollution that is in violation of any national ambient air quality standard or the maximum allowable increase in emissions of that pollutant. N.D. Admin Code § 33-15-15-01(4)(e); 40 C.F.R. § 52.21(k). The North

Dakota PSD regulations further require any person who wishes to modify or construct a major source in an attainment area to provide to North Dakota all information necessary to conduct the analysis or make the necessary determinations under N.D. Admin Code § 33-15-15-01(4)(h); 40 C.F.R. § 52.21(m), (n), & (o).

C. Title V Operating Permit Requirements

25. Title V of the Act, 42 U.S.C. §§ 7661-7661f, establishes an operating permit program for certain sources, including “major sources.” The purpose of title V is to ensure that all “applicable requirements” for compliance with the Act, including PSD and NSPS requirements, are collected in one place.
26. North Dakota’s title V operating permit program was granted final approval by EPA on June 17, 1999, at 64 Fed Reg. 32,433, and since amended on a number of occasions. Each amendment has also been approved by EPA. North Dakota’s title V operating permit program is currently codified in the North Dakota Air Pollution Control Act, N.D.C.C. chapter 23-25, as implemented by N.D. Admin Code § 33-15-14-06 .
27. Section 502(a) of the Act, 42 U.S.C. § 7661a(a), and the North Dakota title V operating permit program, N.D.C.C. chapter 23-25, as implemented by N.D. Admin Code § 33-15-14-06, have at all relevant times made it unlawful for any person to violate any requirement of a permit issued under title V or to operate a major source except in compliance with a permit issued by a permitting authority under title V.
28. Section 504(a) of the Act, 42 U.S.C. § 7661c(a), implementing regulations of the Act, 40 C.F.R. § 70.2, and the North Dakota title V operating permit program, N.D.C.C. chapter

23-25, as implemented by N.D. Admin Code § 33-15-14-06, have at all relevant times required that each title V permit include, among other things, enforceable emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Clean Air Act and the requirements of the applicable SIP, including any applicable PSD requirement to comply with an emission rate that meets BACT and any applicable NSPS requirement.

29. The North Dakota title V operating permit program, N.D.C.C. chapter 23-25, as implemented by N.D. Admin Code § 33-15-14-06, requires that a source submit a complete permit application which, among other things, identifies all applicable requirements (including any requirement to meet BACT pursuant to PSD and to comply with NSPS), certifies compliance with all applicable requirements, and contains a compliance plan for all applicable requirements for which the source is not in compliance.

D. Clean Air Act Enforcement Provisions

30. Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1), provides that:

Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which the plan applies of such finding. At any time after the expiration of 30 days following the date on which the notice of violation is issued, the Administrator may . . .

* * *

(C) bring a civil action in accordance with subsection (b) of this section.

31. Section 113(a)(3) of the Act, 42 U.S.C. § 7413(a)(3), provides that:

“except for a requirement or prohibition enforceable under the preceding provisions of this subsection, whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of this subchapter . . . including, but not limited to, a requirement or prohibition of any rule, plan, order, waiver, or permit promulgated, issued or approved under those provisions or subchapters . . . the Administrator may . . . bring a civil action in accordance with subsection (b) of this section”

32. Section 113(b)(1) of the Act, 42 U.S.C. § 7413(b)(1), authorizes the Administrator to initiate a judicial enforcement action for a permanent or temporary injunction, and/or for civil penalties, against any person whenever such person has violated, or is in violation of any requirement or prohibition of an applicable implementation plan. The violator is subject to civil penalties of up to \$25,000 per day of violation for violations occurring before January 30, 1997, up to \$27,500 per day for such violations occurring on or after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, and up to \$32,500 per day per violation on or after March 15, 2004, pursuant to 40 C.F.R. § 19.

33. Section 113(b)(2) of the Act, 42 U.S.C. § 7413(b)(2), authorizes the Administrator to initiate a judicial enforcement action for a permanent or temporary injunction, and/or for civil penalties against any person whenever such person has violated, or is in violation of, requirements of the Act other than those specified in Section 113(b)(1), 42 U.S.C. § 7413(b)(1), including violations of Section 165(a), 42 U.S.C. § 7475(a). The violator is subject to civil penalties of up to \$25,000 per day of violation for violations occurring

before January 30, 1997, up to \$27,500 per day for such violations occurring on or after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, and up to \$32,500 per day per violation after March 15, 2004, pursuant to 40 C.F.R. § 19.

34. Section 167 of the Act, 42 U.S.C. § 7477, authorizes the Administrator and a state to initiate an action for injunctive relief, as necessary, to prevent the construction, modification or operation of a major emitting facility that does not conform to PSD requirements.

D. General Allegations

35. At all times pertinent to this civil action, the Settling Defendants have been and are the owners and/or operators of the Milton R. Young Station, including all of the boilers at this facility.
36. At all times pertinent to this civil action, the electricity generating units within the Milton R. Young Station were each a "major stationary source," within the meaning of the Act and the North Dakota SIP for NO_x, SO₂, and PM for purposes of the PSD program.

FIRST CLAIM FOR RELIEF
(PSD Violations at the Milton R. Young Station)

37. Paragraphs 1 through 36 are realleged and incorporated herein by reference.

38. At various times, the Settling Defendants commenced construction and operation of major modifications, as defined in Paragraph 20 herein, at its Milton R. Young Station. These major modifications included, but are not limited to:
- a. Replacement of the Unit 1 secondary superheater in 1997;
 - b. Partial replacement of the Unit 1 reheat superheater in 1997;
 - c. Modification of the Unit 1 coal crushing and coal handling systems in 1991;
 - d. Replacement of the Unit 2 secondary superheater in 1995;
 - e. Replacement of the Unit 2 reheater in 1995;
 - f. Replacement of the Unit 2 top bank primary superheater in 1995;
 - g. Replacement of the Unit 2 gas recirculation fans in 1988, 1995, and 1998;
 - h. Modifications to the Unit 2 feedwater heater in 1988; and
 - i. Modifications to the Unit 2 coal handling system in 1996.
39. These modifications resulted in significant net emissions increases, N.D. Admin Code § 33-15-15-01(1)(aa); 40 C.F.R. § 52.21(b)(3), of one or more of the following pollutants: NO_x, SO₂, and PM.
40. The Settling Defendants violated and continue to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and the PSD regulations set forth in the North Dakota SIP, as codified in N.D. Admin Code chapter 33-15-15, by, *inter alia*, undertaking such major modifications at the Milton R. Young Station and operating these modified units without:
- a. obtaining a PSD permit, as required by N.D. Admin Code § 33-15-15-01(4)(b); 40 C.F.R. § 52.21(a)(2)(iii), and the North Dakota SIP;

- b. applying best available control technology for NO_x, SO₂, and PM, as required by N.D. Admin Code § 33-15-15-01(1)(g); N.D. Admin Code § 33-15-15-01(4)(c); 40 C.F.R. § 52.21(b)(12), and the North Dakota SIP;
 - c. demonstrating that construction or modification in conjunction with all other applicable emissions increases or reductions, including secondary emissions, from any other sources would not cause or contribute to air pollution in violation of any national and/or North Dakota ambient air quality standard or any applicable maximum allowable increase over the baseline concentration in any area, as required by N.D. Admin Code § 33-15-15-01(4)(e); 40 C.F.R. § 52.21(k), and the North Dakota SIP;
 - d. performing an analysis of the ambient air quality in the area, as required by North N.D. Admin Code § 33-15-15-01(4)(g); 40 C.F.R. § 52.21(m), and the North Dakota SIP;
 - e. submitting to EPA or North Dakota all information necessary to conduct the analysis or make the necessary determinations under N.D.C.C. chapter 23-25 and N.D. Admin Code chapter 33-15-15, as required under N.D. Admin Code § 33-15-15-01(4)(h); 40 C.F.R. § 52.21(m), (n), & (o) ; and
 - f. obtaining the required North Dakota permits.
41. Based upon the foregoing, the Settling Defendants have violated and continue to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and the North Dakota SIP, the North Dakota PSD regulation, N.D.C.C. chapter 23-25 and N.D. Admin Code chapter 33-15-15.

Unless restrained by an order of this Court, these and similar violations of the PSD provisions of the Act will continue at the Milton R. Young Station.

42. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the PSD violations set forth above subject the Settling Defendants to injunctive relief and civil penalties of up to \$25,000 per day for each violation at the Milton R. Young Station prior to January 30, 1997, \$27,500 per day for each such violation on or after January 30, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, and up to \$32,500 per day for violations on or after March 15, 2004, pursuant to 40 C.F.R. § 19.

SECOND CLAIM FOR RELIEF

(Title V Violations at the Settling Defendants's Milton R. Young Station)

43. Paragraphs 1 through 42 are realleged and incorporated herein by reference.
44. As set forth above, the Settling Defendants commenced one or more major modifications, as defined under the PSD regulations in the North Dakota SIP, at the Milton R. Young Station. As a result, these modifications triggered the requirements to, *inter alia*, undergo a new BACT determination, to obtain a PSD permit establishing emissions limitations that meet BACT pursuant to such a determination, and to operate in compliance with such limitations. The Settling Defendants failed to satisfy these requirements.
45. Subsequently, the Settling Defendants failed to submit a complete application for a Title V operating permit for the Milton R. Young Station that identified all applicable

requirements, that accurately certified compliance with such requirements, and that contained a compliance plan for all applicable requirements for which the source was not in compliance (including the requirement to meet BACT pursuant to a new BACT determination under PSD). The Settling Defendants failed to obtain a proper or adequate title V operating permit for the Milton R. Young Station that contained emission limitations for NO_x, SO₂, and/or PM that met BACT pursuant to a new BACT determination. The Settling Defendants thereafter operated the Milton R. Young Units without meeting such limitations and without having a valid operating permit that required compliance with such limitations or that contained a compliance plan for all applicable requirements for which the source was not in compliance. The Settling Defendants's conduct violated Sections 502(a) and 504(a) of the Act, 42 U.S.C. §§ 7661a(a) and 7661c(a), and the North Dakota title V operating permit program regulations, N.D.C.C. chapter 23-25, as implemented by N.D. Admin Code § 33-15-14-06. Unless restrained by an order of this Court, these and similar violations will continue.

46. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), the violations set forth above subject the Settling Defendants to injunctive relief and civil penalties of up to \$25,000 per day for each violation prior to January 31, 1997, and \$27,500 per day for each violation on or after January 31, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701 except for violations of Section 113(b) of the Clean Air Act on or after March 15, 2004,

which subject the Settling Defendants to civil penalties of up to \$32,500 per day pursuant to 40 C.F.R. § 19.

PRAYER FOR RELIEF

WHEREFORE, based upon all the allegations contained in paragraphs 1 through 46 above, the United States of America requests that this Court:

1. Permanently enjoin the Settling Defendants from operating the electricity generating units at its Milton R. Young, including the construction of future modifications, except in accordance with the Clean Air Act and any applicable regulatory requirements;
2. Order the Settling Defendants to remedy its past violations by, among other things, requiring the Settling Defendants to install in its Milton R. Young Station, as appropriate, the best available control technology for each pollutant subject to regulation under the Clean Air Act;
3. Order the Settling Defendants to apply to the North Dakota Department of Health for permits that are in conformity with the requirements of the PSD program, the Title V program, and the North Dakota SIP;
4. Order the Settling Defendants to conduct audits of its operations to determine if any additional modifications have occurred which would require it to meet the requirements of the PSD program and report the results of these audits to the United States;
5. Order the Settling Defendants to take other appropriate actions to remedy, mitigate, and offset the harm to public health and the environment caused by the violations of the Clean Air Act alleged above;

6. Assess a civil penalty against the Settling Defendants of \$25,000 per day for each violation of the Clean Air Act and applicable regulations, \$27,500 per day for each such violation after January 30, 1997, and \$32,500 per day for each such violation on or after March 15, 2004;
7. Award Plaintiffs their costs of this action; and,
8. Grant such other relief as the Court deems just and proper.

Respectfully Submitted,

FOR THE UNITED STATES:

SUE ELLEN WOOLDRIDGE
Assistant Attorney General
Environment and Natural Resources
Division

-
C _____
MATTHEW W. MORRISON
Senior Counsel
Environmental Enforcement Section
Environment and Natural Resources
Division
Department of Justice
P.O. Box 7611
Washington, D.C. 20530
(202) 514-3932

DREW H. WRIGLEY
United States Attorney
District of North Dakota

CAMERON W. HAYDEN
Assistant U.S. Attorney
220 East Rosser Avenue,
Suite 372
Bismark, ND 58501
701-530-2420
N.D. Bar I.D. Number 03903

OF COUNSEL:

JEFFREY A. KODISH
Attorney Advisor
U.S. Environmental Protection Agency
12345 West Alameda Parkway, Suite 214
Lakewood, CO 80228

BRENDA MORRIS
Enforcement Attorney
U.S. Environmental Protection Agency
999 18th Street
Denver, CO 80202

FOR THE STATE OF NORTH DAKOTA:

WAYNE STENEHJEM
Attorney General
State of North Dakota

LYLE G. WITHAM
Counsel of Record
Assistant Attorney General
State Bar ID No. 04118
Office of the Attorney General
500 North 9th Street